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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL A. SCHJANG, Petitioner - Appellant, v. MICHAEL BUDGE, Respondent - Appellee.	No. 04-16722 D.C. No. CV-01-00660-HDM/VPC MEMORANDUM [*]

Appeal from the United States District Court
for the District of Nevada
Howard D. McKibben, District Judge, Presiding

Submitted March 8, 2006[**]

Before: CANBY, BEEZER, and KOZINSKI, Circuit Judges.

Nevada state prisoner Michael A. Schjang appeals from the district court's judgment denying his 28 U.S.C. § 2254 habeas corpus petition challenging his guilty plea conviction for kidnaping with a deadly weapon and sexual assault with

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[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

[**] This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

a deadly weapon. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we affirm.

Schjang first contends that the district court should have offered him the opportunity to stay his mixed habeas petition so that he could return to state court to exhaust his unexhausted claims. We review for abuse of discretion the district court's decision to grant or deny a "stay and abeyance" of a habeas petition, *see Rhines v. Weber*, 544 U.S. 269, 125 S. Ct. 1528, 1534-35 (2005), and conclude that no abuse of discretion occurred. After determining that Schjang's habeas petition was mixed, the district court gave him the opportunity to exercise his options under *Rose v. Lundy*, 455 U.S. 509, 510 (1982), and offered Schjang an administrative closure procedure that was the equivalent of a stay and abeyance. Schjang rejected that procedure and knowingly and voluntarily elected to abandon the unexhausted claims in order to proceed with the exhausted claims.

Schjang next contends that the district court erred when it held that he had not properly exhausted his ineffective assistance of counsel claim. We review this issue de novo. *See Peterson v. Lampert*, 319 F.3d 1153, 1155 (9th Cir. 2003) (en banc).

A post-conviction petition from a prisoner proceeding pro se may be viewed more leniently for exhaustion purposes than a petition drafted by counsel. *See*

Sanders v. Ryder, 342 F.3d 991, 999 (9th Cir. 2003); *Peterson*, 319 F.3d at 1159. With those standards in mind, we conclude that Schjang's first, state post-conviction petition did alert the Nevada courts to the legal and factual basis for his ineffective assistance of counsel claim. *See Sanders*, 342 F.3d at 999-1000. We nevertheless affirm the district court because Schjang's claim fails for lack of prejudice. *See Hill v. Lockhart,* 474 U.S. 52, 56-60 (1985) (setting forth the ineffective assistance of counsel analysis applicable to guilty plea convictions); *Bonin v. Calderon*, 77 F.3d 1155, 1157 (9th Cir. 1996) ("We may affirm on any ground supported by the record, even if it differs from the rationale of the district court."). Schjang has neither alleged nor demonstrated that, but for counsel's alleged failure to investigate the circumstances surrounding his confession, he would not have pled guilty but would have insisted on going to trial. *See Hill*, 474 U.S. at 56-60.

Finally, we deny Schjang's request to broaden the certificate of appealability because he has not made a "substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2); 9th Cir. R. 22-1(e).

AFFIRMED.